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Via Courier

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Reply Comments of Excel Communications, Inc.
In the Matter of Implementation of the Subscriber Carrier Selection Changes
Provisions of the Telecommunications Act of 1996 -- CC Docket No. 94-129

Dear Mr. Canon:

On behalf of Excel Communications, Inc. ("Excel"), please find enclosed for filing an original and twelve (12) copies of the Reply Comments of Excel in the above-referenced Docket. Also enclosed is a diskette containing Excel's comments formatted using WordPerfect 5.1.

Please date-stamp the enclosed extra copy of this filing and return it with our courier. If you have any questions concerning this filing, please do not hesitate to contact the undersigned.

Respectfully submitted,


C. Joel Van Over
Dana Frix

Its Counsel

Enclosures

cc: Robbin Johnson
Cathy Seidel (CCB)
Formal Complaint Branch (CCB)
ITS

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

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Implementation of the Subscriber Carrier)
Selection Changes Provisions of the)
Telecommunications Act of 1996)
)
Policies and Rules Concerning)
Unauthorized Changes of Consumers')
Long Distance Carriers)

CC Docket No. 94-129

**REPLY COMMENTS OF
EXCEL COMMUNICATIONS, INC.**

Excel Communications, Inc. ("Excel"), by undersigned counsel and pursuant to the Public Notice issued by the Federal Communications Commission ("Commission") on August 14, 1997, hereby submits its Reply Comments in the above-referenced proceeding. As described below, Excel asserts that the Commission must take several steps beyond the vague proposals set forth in the *NPRM* to both guarantee effective consumer protection and ensure a competitive balance between incumbent carriers and new entrants attempting to obtain a customer base.¹

I. COMMISSION REGULATIONS SHOULD BE COMPETITIVELY NEUTRAL.

Most commenters recognize that incumbent local exchange carriers ("LECs") will have

¹ See *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration (rel. July 15, 1997) ("*NPRM*").

strong incentives to control the PIC change process to their competitive advantage, and thus to the ultimate disadvantage of consumers. Any rules this Commission adopts must therefore recognize the system's inherent vulnerability to manipulation for competitive purposes. As a threshold matter, Excel suggests, consistent with comments by MCI, Sprint, and others, that incumbent LECs should not be the gatekeepers of the PIC change process. While an expanded rulemaking may be necessary to fully address this issue, Excel also recognizes that interim safeguards consistent with Excel's initial and reply comments herein, must be implemented now as the Commission moves toward fulfilling its section 258 mandate.

First, Excel agrees that any PIC change or PIC freeze, where the submitting and executing carrier is the same, must be subject to verification. In particular, it must be recognized that incumbent LECs are no longer neutral: they have an increasing economic stake in the outcome of PIC changes.

Second, many commenters note that PIC change requests constitute competitive sensitive information. Therefore, in no event should an executing incumbent be permitted to use this information, or the fact that a consumer has requested a PIC change, to solicit a PIC freeze or solicit a win-back before executing and confirming a PIC change request. Moreover, if a customer is subject to a PIC freeze, the executing carrier must be required to provide this information to a submitting carrier upon request and automatically at the time a PIC change is submitted. To assure that PIC freezes are not used anticompetitively, Excel agrees with the Competitive Telecommunications Association's suggestion that incumbent LECs be subject to a six-month moratorium during which they are prohibited from soliciting PIC freezes. The

moratorium would begin when the incumbent LEC receives section 271 approval from the Commission. Depending upon industry experience, it may be necessary to extend the moratorium to one year, as MCI recommends.

Third, Excel notes that other commenters agree with Excel, including MCI and WorldCom, that the Commission should require timely execution of PIC change requests. A PIC change implemented within three days, for example, will discourage the misuse of the submitting carrier's proprietary information to win-back or solicit a PIC freeze, before the PIC change has been implemented and confirmed to the submitting carrier, and will protect consumers from confusion concerning their selected carrier.

Fourth, as several commenters have noted, it is essential to assure that incumbent LECs do not use their PIC freeze practices to discriminate against other carriers or confuse or mislead consumers. Thus, regulation by the Commission in this area is essential and must be comprehensive.

As MCI and the New York Consumer Protection Board point out, the Commission's current NPRM does not adequately define PIC freezes, acceptable procedures to assure nondiscriminatory practices in soliciting and implementing PIC freezes, and acceptable procedures for removing a PIC freeze.

Excel agrees with MCI that incumbent LECs can be expected to use their existing market advantages to aggressively market PIC freezes to their existing local customers and their new long distance customers, and to attempt to tie PIC freezes in local service to their long distance services. Without regulatory definitions and structure, incumbent LECs (especially, the

Regional Bell Operating Companies “RBOCs” and GTE) will be in a position to use different standards for placing and removing PIC freezes depending upon the identity of the submitting carrier.

For example, the incumbent LECs have a tremendous amount of competitive information concerning the market share of each long distance carrier serving their local customers. They have similar information concerning competitive local exchange carriers (“CLECs”). Incumbents can use this information to strategically solicit PIC freezes and to make it difficult for their competitors to submit, implement, or remove PIC freezes for customers who wish to take advantage of competitive local and long distance service. To assure that incumbent LECs do not use strategic PIC freeze practices as a barrier to entry, the Commission must define acceptable PIC freeze practices. Excel therefore recommends, like MCI, that the Commission adopt standard language describing PIC freezes, how they work, and how they can be removed.

While the current NPRM raises important issues regarding PIC freezes, and recognizes that they can be used anticompetitively, Excel is concerned that piecemeal regulation may create undesired effects. For example, if incumbent LECs were required to provide their customers with information about PIC freezes, this could simply be used as a marketing tool to protect their market position. Informing consumers how to “protect” themselves from competition *before* they have any idea about their competitive options in the new marketplace is inherently suspect. As new long distance carrier/CLECs begin to be in a position to offer both local and long distance service as a seamless competitive offering, the incumbent LECs would be in a position to prevent it through their prophylactic marketing of local service PIC freezes. While

confirmation of the validity of all incumbent LEC-solicited PIC freeze “changes” may be a first step, without defining the overall process, the Commission will forego an opportunity to discipline this process from the outset.

II. THE COMMISSION SHOULD CLARIFY THAT ITS PREFERRED CARRIER SELECTION RULES PRE-EMPT ANY INCONSISTENT STATE REGULATIONS, AND ENSURE THAT ITS RULES WILL HAVE NATIONAL APPLICABILITY.

Excel contends that the arguments made by several commenters in opposition to federal pre-emption of inconsistent state PC-change rules overlook the obvious flaws in a system that requires carriers and customers to conform to a patchwork of different and inconsistent rules. For example,² NYDPS comments ignore the plain language of Section 258(a) of the Telecommunications Act of 1996 (“1996 Act”).³ Specifically, Section 258(a) confirms that the states can and should play have an important role in “enforcing” Commission-prescribed procedures with respect to intrastate services. While consumer protection is unarguably of central importance to the states, the Commission must clarify that inconsistent state rules cannot stand in light of this Commission’s findings on which PIC selection rules are appropriate. To the extent that the federal rules ultimately adopted in this proceeding conflict with existing state laws governing carrier selection, this Commission should therefore preempt such state laws before they confuse customers and impose competitive burdens on those conscientious carriers

² NYDPS comments

³ 47 U.S.C. § 258(a) (1996).

like Excel that make the effort necessary to comply with state and federal consumer protection regulations.

Excel's suggestion is not hypothetical, but is based upon palpable conflict and inconsistency between State and Commission regulation. For example, the Georgia Public Service Commission has proposed the following rule: "No inducements of any kind shall be used to solicit any changes *unless all inducements are clearly and conspicuously stated on the letter of agency.*"⁴ The existing federal rule, in contrast, states: "The letter of agency shall *not be combined with inducements of any kind on the same document.*"⁵ Taken together, these rules essentially require a carrier to obtain two letters of agency ("LOAs") to provide intrastate and interstate long distance service to a Georgia customer: one LOA would need to contain the language prescribed by the federal rule (making no reference to "inducements"), and another LOA would need to comply with the Georgia rule by explicitly describing the "inducements" given to the customer for his business. In light of such inevitable conflicts and in the interest of providing clear guidance to all carriers and consumers of the prerequisites of compliance, this Commission should act to preempt any state regulation that is inconsistent with the federal rules promulgated in this proceeding.

For similar reasons, the Commission should utilize this rulemaking to alleviate the burdens associated with conflicting rules in different states. As Excel noted, "[t]he expense of

⁴ Ga. P.S.C. Proposed Rule (3)(c) (*emphasis added*), Docket No. 6872-U (Dec. 11, 1996).

⁵ 47 C.F.R. § 64.1150(c) (*emphasis added*).

compliance with 51 varying sets of carrier change regulation will be prohibitive.”⁶ For example, California currently requires that carriers obtain independent, third-party verification for execution of a change in a residential customer’s preferred carrier,⁷ essentially removing the need for an LOA in that context. On the other hand, North Carolina is considering proposed rules that would allow carriers to verify carrier change requests in several ways, but require a carrier to produce an LOA if a dispute should arise.⁸ Furthermore, South Dakota requires by statute that any carrier soliciting a customer by telemarketing must obtain an LOA in lieu of any other means of verification.⁹ Excel does not wish to pass judgment on which state’s method is superior to any others, and by no means does Excel criticize these states for their legitimate concerns about consumer protection. However, Excel wishes to bring to this Commission’s attention the fact that carriers operating on a nationwide basis will incur significant costs in adapting their operations to the individual requirements imposed by each state, particularly when some states simply contradict one another in their requirements. Customer confusion will also result, as those businesses operating in several states wish to change service providers and encounter a variety of procedures they must negotiate simply to obtain service from their preferred telephone provider.

⁶ Comments of Excel, at 3.

⁷ Cal. Pub. Util. Code § 2889.5.

⁸ *In the Matter of Rules for Changing a Consumer’s Communications Service*, Docket No. P-100, Sub 139, Order Instituting Rulemaking and Requesting Comments (rel. Jun. 12, 1997), at Appendix A, Proposed Rules R19-2 through R19-4.

⁹ S.B. No. 44, § 4 (effective July 1, 1997).

III. CONCLUSION

Given the complex issues and divergent views raised by commenters, Excel urges the Commission to issue precise proposed rules for further comment before adopting permanent carrier selection regulations implementing section 258. Excel further urges the Commission to adopt reasonable safeguards to assure that incumbent local exchange carriers are not in a position to leverage their control over the PIC change process. Moreover, while State commissions have a critical role to play in the enforcement of carrier selection rules, section 258 mandates that this Commission take the lead in adopting uniform carrier selection regulations. The Commission should therefore expressly pre-empt conflicting and inconsistent State regulations.

Respectfully submitted,

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Dated: September 29, 1997